IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1411 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GOVIND TALSI SATHVARA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1411 of 1993
MR YOGESH S LAKHANI with MR NISHITH THAKKAR and MR NEHAL R JOSHI for Petitioner No. 1
PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 16/01/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. The appellant has challenged in this appeal the judgment and order of conviction and sentence passed against him by the Ld. Addl. Sessions Judge, Morbi in Sessions Case No. 9 of 1991 dated 30th October, 1993. The learned trial Judge has convicted the appellant for an offence made punishable u/S. 302 of the Indian Penal Code (for short 'IPC') and has sentenced him to suffer imprisonment for life. He has also been convicted for an offence u/S. 307 of the IPC and he has been sentenced to suffer RI for five years and to pay fine of Rs.200/-, in default simple imprisonment for two months and for committing offence u/Ss. 37 (i) and 135 of the Bombay Police Act (BP Act) he has been sentenced to suffer SI for one month and to pay fine of Rs.100/-, in default SI for 15 days.

2. The case of the prosecution in nutshell can be stated as under :-

2.1. The complainant Kadar Gulambhai alongwith his friend the deceased Husenbhai Virambhai was sitting near the Ghanshyam Market on 18th September, 1990 in the evening at about 8.00 O'clock. At that time the present appellant came there and he started abusing Kadarbhai and demanded Rs.80/- which Kadarbhai owed to him. Kadarbhai, however, showed his inability to pay the said amount and told the appellant that he would pay it later. Immediately thereafter the appellant brought out knife and he started giving knife blows to Kadarbhai. Initially Kadarbhai managed to snatch the knife from the appellant but the appellant again got it back and he started causing injuries to Kadarbhai. Deceased Husen tried to intervene with a view to save Kadarbhai, but he was seriously wounded by the appellant. As a result of that, Husenbhai fell on the ground in profusely bleeding condition. So far Kadarbhai is concerned, he managed to go upto some distance where he was helped by one Dhanajibhai, owner of garage to board rickshaw and to go to the Government hospital at Morbi. Later on Husenbhai was also brought to said hospital. The say of the prosecution is that in the hospital he was treated for some time and thereafter he died. Since injuries suffered by Kadarbhai were of serious nature, he was advised to be taken to Rajkot for further treatment as per the medical advice. While at hospital in Morbi Kadarbhai gave his complaint wherein he has narrated the aforesaid version of the incident. On receipt of the

complaint, the police registered the offence against the appellant and commenced usual investigation. In the course of the investigation, the investigating agency recorded statements of various persons, drew the panchnama of the scene of offence, inquest panchnama, sent the dead body for post mortem and also arrested the appellant. The appellant himself had suffered serious injuries and he was hospitalised for treatment. It may also be noted here that the present appellant had also filed complaint against Kadarbhai and the deceased for assaulting him and causing him serious injuries. The said complaint was for an offence u/S. 307 of the IPC. At the end of the investigation the charge-sheet was submitted in the Court of the concerned learned Magistrate, who in turn committed the case to the Court of Sessions being exclusively triable by the Court of Sessions.

3. At the trial the learned Judge framed charge against the appellant for committing offences punishable u/Ss. 307, 302 of the IPC and u/S. 135 of the BP Act. The said charge is at Exh. 1 on the record of the case. The appellant pleaded not guilty to the said charge and claimed to be tried.

4. In the course of the trial, the prosecution examined witnesses, namely (1) Kadarbhai Gulambhai, P.W. 1 Exh. 5, (2) Pravinbhai Valjibhai Chavda P.W. 2 Exh. 6, (3) Dhanajibhai Purshotambhai P.W. 3 Exh. 7, (4) Husenbhai Sidikbhai P.W. 4 Exh. 8, (5) Dr. Padmaben Kunpara P.W. 5 Exh. 20, (6) Hussain Jumabhai P.W. 6 Exh. 24, (7) Hajibhai Virbhai P.W.7 Exh. 25, (8) Dilipbhai Harjivanbhai P.W. 8 Exh. 27, (9) Salimbhai Gulambhai P.W. 9 Exh. 27, (10) Jusab Ayubbhai P.W. 10 Exh. 28, (11) Tajmohmed Jusabbhai P.W. 11 Exh. 32, (12) Suleman Jumabhai P.W.12 Exh.33, (13) Ramsing Kanajibhai Kotwal P.W. 13 Exh. 36 and Shashikant Chandulal Dave P.W. 14 Exh. 39 Apart from this, the prosecution also placed reliance on certain documentary evidence such as FIR, the warthy recorded by the police, the post mortem notes, various panchnamas, etc.

4.1. So far the appellant is concerned, no specific case has been put forward nor any specific defence has been pleaded by him and his defence appears to be that of general denial. Ultimately at the end of the trial, the learned trial Judge found him guilty for committing the aforesaid offences and passed order of conviction and sentence already stated above.

5. Mr. Y.S. Lakhani, learned advocate for the appellant has challenged this judgment on various grounds. He has submitted that the prosecution has not been able to prove beyond any reasonable doubt the guilt of the appellant and, therefore, benefit of doubt is required to be given to the appellant. He has further submitted that the oral evidence of the prosecution witnesses cannot be believed because it consists of the persons who are deeply interested in securing conviction of the appellant, since they are related either to the complainant or to the deceased and no independent evidence has been brought on record by the prosecution. He has further submitted that apart from injured Kadarbhai, the prosecution has examined several witnesses with regard to the actual incident. However, these witnesses do not have any personal knowledge about the incident nor they name the person from whom they got this information. In absence of such particulars their evidence even prima-facie cannot be believed. He has also submitted that these witnesses have been got up by the prosecution only with a view to support the version which has been given by the complainant, who is out to save his own skin because he is an accused of the case wherein the appellant is the complainant. The second limb of his argument is that though the appellant has not specifically pleaded a case of self defence, from the evidence on record it clearly appears that he did have such right and if the injuries are caused by the appellant while exercising the right of private defence, no offence can be said to have been committed by him. He has further submitted that the appellant himself has suffered grievous injury on the stomach, which required hospitalisation for number of days and the prosecution witnesses have not explained this injury and they have tried to suppress the correct facts. Hence, according to him, when the origin of the incident is suppressed by the prosecution, its benefit should be given to the appellant. He has further submitted that even if the appellant is found guilty of committing some offence, it would be at the most an offence punishable u/S. 304 Part-I of the IPC and not u/S. 302 of the IPC. It is his submission that even if the prosecution story is believed, the appellant appears to have merely exceeded the right of private defence, for which his case can be covered under exception II to section 300 of the IPC and conviction could be u/S. 304 Part-I. He has, therefore, submitted that the ends of justice would meet if the appellant is sentenced to suffer imprisonment already undergone by him. Lastly he has submitted that this appeal deserves to be allowed.

5.1. As against this, Mr. I.M. Pandya, Ld. APP has submitted that the prosecution has proved the guilt of the appellant beyond any reasonable doubt and the conviction recorded by the learned Judge u/S. 302 as well as u/S. 307 of the IPC is absolutely just and proper and it does not require any interference by this Court. He has further submitted that the evidence of Kadarbhai is amply supported by the medical evidence on record and, therefore, his evidence has to be accepted in toto. He has further submitted that even if the evidence of other witnesses with regard to the actual incident is not accepted by the Court, the evidence of Kadarbhai would be sufficient to enable the Court to base conviction u/Ss. 302 and 307 of the IPC. According to Mr. Pandya, the plea of self defence is not available to the appellant because he has never pleaded it before the trial Court. Not only that even no suggestions were made on that line to the prosecution witnesses by the defence in the cross-examination. He has submitted that even when the prosecution witnesses have not explained the injury on the person of the accused, it cannot be said to be inherent infirmity in prosecution's case and the only offence that the appellant could be held guilty of is u/S. 302 of the IPC. Lastly, he has submitted that this appeal does not have any merit and it should be dismissed.

6. With a view to reappreciate the entire evidence we have carefully gone through the record and proceedings of the case and have also considered the rival submissions.

7. P.W. 1 Kadarbhai Gulambhai, who is an injured witness, has deposed before the Court that on the day of incident i.e. on 18th September, 1990 in the evening at about 8.00 O'clock he and his friend Husenbhai Virambhai were sitting near Ghanshyam Market. At that time the appellant came there and he demanded a sum of Rs.80/- from Kadarbhai. Kadarbhai, however, told him that he would not able to pay him because he did not have money with him at that time. On hearing this the appellant got enraged and he brought out knife and started assault on Kadarbhai. He has further stated that initially he could manage to snatch away the knife from the appellant but the appellant again snatched it from him and thereafter he started inflicting blows on him. In the meanwhile his friend Husen tried to intervene with a view to save him, but the appellant also inflicted knife blows on him, as a result of which Husen fell down on the ground. According to the witness, he received injuries on the stomach and left armpit. He could not

notice what injuries were caused to the deceased. He has further stated that first he went to a hospital which is a private hospital, but he was asked to go to Government hospital. One Dhanajibhai helped him in sending to the Government hospital in a rickshaw. According to Kadarbhai, the motive for the assault was that he owed Rs.80/- to appellant which he demanded and he could not give. He has further stated that after receiving some treatment at Morbi hospital he was brought to Rajkot by his brother Salim. He has also stated that while in the hospital at Morbi he gave a complaint against the appellant with regard to the present incident.

7.1. In the cross-examination by the defence, he has admitted that after he was discharged from the hospital at Rajkot, he was arrested by the police in connection with complaint filed against him u/S. 307 of the IPC by the appellant. He has further stated that at the time of incident he had seen Husen lying on his side on the ground, but he could not call him because he (the witness) was not in a position to speak. He has further stated that before he left the place for hospital, he had noticed that Husen was not dead. He has denied the suggestions made by the defence that he and Husen had abused the appellant and that it was Husen who had given a knife blow to the appellant on the stomach. He has further denied that he had seen any blood on the clothes of the appellant and he has also turned down the suggestion made by the defence to the effect that though he had seen the injury and blood stained clothes of the appellant, he was deliberately pleading his ignorance about it and was deposing falsely. He has also denied the suggestion made by the defence that there was a scuffle between the deceased and the appellant to get possession of the knife and that the witness as well as the deceased had received injuries in this scuffle.

7.2. The second witness is P.W. 2 Pravinbhai Valjibhai, who is working in the hospital of Dr. R.N. Ghania, which is situated near the scene of offence. This witness has not supported the prosecution and he has been declared hostile. It is not necessary for us to deal with evidence of this witness in this judgment.

7.3. The next witness is Dhanjibhai Purshotambhai, who in his evidence has stated that on the day of incident while he was repairing a jeep car in his garage, he heard some commotion and went out to see what had happened. At that time he noticed one person lying on the ground in profusely bleeding condition and he was almost unconscious. He, therefore, summoned one rickshaw

and helped the injured to get in it and sent him to the hospital.

7.4. Husenbhai Sidikbhai P.W. 4 has stated that at the relevant time he was discharging duty as bus driver in S.T. Depot at Dhrol and since his family was staying at Morbi, he used to make up and down trip between Morbi and Dhrol. On the night of the incident while he was sitting at the bus stand near Taxiwali Sheri alongwith his friend Husen Juma alias Janiyo Kadam Sidi Alarakha Galibhai, etc. At that time he received information that there was some quarrel going on near A.J. Company and in the said incident Husen Virambhai had received injuries with knife. He also came to know who had caused these injuries. He and his friends thereafter went to the place of incident in his taxi. When they reached there they saw Husen lying in a pool of blood. When asked, Husen in a feeble voice told them that it was the appellant (Govind Talsi) who had caused him injuries with knife. He was immediately taken to the hospital in a motor car. After they reached the hospital, they were asked to wait some time by the Medical Officer and after about 5 to 10 minutes they were informed by the doctor that Husen was no more. They thereafter went to Kadarbhai to meet him and Kadarbhai told them that the appellant was demanding money for the vegetables and since it was not given he had caused injuries to him and Husen by means of a knife. In the cross-examination this witness has stated that only 4 persons had taken the deceased to the hospital and at that time his brother Haji Viram was not in the hospital. He has denied the suggestion made by the defence in the cross-examination that he and Kadarbhai had planned out a story to be told in connection with this incident. He has also denied that initially it was decided to lodge complaint against Govind without any further detail. However, his name was not given with a view to falsely involve him in the present crime. He has further denied the suggestion made on behalf of the defence that though Husen was dead, the witness and his friends were telling that Husen was alive only with a view to fabricate oral dying declaration. He has also stated in the cross-examination that while lifting the body of Husen his hands had got stained with blood but his clothes had remained clean and had not received any stains of blood. The rest of the cross-examination of this witness is not of much importance.

7.5. Dr. Padmaben Kunpara P.W. 5 has deposed before the Court that she had examined one Kadar Gulambhai at about 9.00 p.m. on 18/9/1990, who had

received injuries on the hands and stomach. These injuries have been in detail described in the medical certificate and also in the evidence of this witness. She has further stated that at about 9.50 p.m. when Husenbhai Virambhai was brought to her and after examining him she had declared him dead. She has also stated that these injuries could be possible by the Muddamal knife. She has referred to the post mortem notes of the deceased and in her evidence details regarding injuries suffered by the deceased have been reproduced. The description of the injuries shows that the deceased had received serious injuries on the vital parts of the body which had caused severe damage to the vital internal organs like the lungs and the heart which had resulted into the death of Husenbhai. In the cross-examination she has been asked about the injuries suffered by the appellant and the injuries received by Kadarbhai. The evidence shows that the appellant had received serious injury on the abdomen region by a weapon which had pierced his stomach and had damaged the intestine.

8. Prosecution has also placed reliance on the witnesses like Suleman Jumabhai and others, who are alleged to have talked to Husenbhai before removing him to the hospital and before him Husenbhai is alleged to have revealed that it was the appellant who had caused injuries to the deceased and Kadarbhai. Since the evidence of these witnesses is of hearsay nature and as regards source of information received by them, there is no evidence we do not propose to reproduce the same in detail.

9. The prosecution has also placed reliance on the evidence of witnesses who are police officers. Their evidence is to describe the course of investigation and to bring the contradictions on record.

9.1. Having seen the above oral evidence, we may now turn our attention to the documentary evidence such as the FIR and post mortem notes. The FIR is given within very short time i.e. about an hour and half of the incident from the hospital itself by the injured witness Kadarbhai and in the said FIR he has narrated in detail as to how the incident had happened. In the said FIR the role played by the appellant has been properly described. It also shows that only because the injured showed his inability to repay the amount of Rs.80/- he assaulted both of them and even caused fatal injuries to the deceased.

10. The first question that is required to be decided is whether deceased died homicidal death. We may therefore, turn our attention to medical evidence on record. Dr. Padmaben's evidence shows that deceased had died due to the injuries received by him. His vital organs like lungs and heart had got damaged. According to Dr. Padmaben these injuries were ante-mortem and were sufficient in ordinary course of nature to cause death. There is no serious challenge to her evidence. We are, therefore, in agreement with the trial Court's finding that Husen died a homicidal death.

11. Now the question that is to be decided is whether appellant has committed any offence and if yes, what offence ? Considering the overall effect of above narrated evidence, it clearly appears that on the night of the incident Kadarbhai as well as Husen had received injuries with knife at the hands of appellant and unfortunately Husenbhai expired on account of the injuries received by him; whereas Kadarbhai required hospitalisation for several days. It may also be noted here that the appellant himself had received, though one injury, of very serious nature and in the process his smaller intestine was badly injured and he also required long term hospitalisation. His presence at the scene of offence is amply established. The question, however, would remain to be decided is whether the prosecution is coming out with the true facts of the incident and in particular with regard to the origin of the incident. Heavy reliance has been placed by the defence on the fact that though the appellant himself had received serious injury, the prosecution witnesses and in particular Kadarbhai has not at all explained this injury and, therefore, the prosecution has deliberately tried to suppress the origin of the incident. If the evidence of Kadarbhai is perused though he has been specifically asked about the injuries caused to the appellant, he has flatly denied having noticed any injury on the appellant. Not only that but he has denied the suggestion made by the defence that at the time when the incident was going on, the clothes of the appellant were stained with blood and he was trying to grapple with deceased Husenbhai to avoid further assault by him. Now looking to the nature of injury suffered by the appellant, it is very clear that it would have caused excessive bleeding which would have extensively stained the clothes of the appellant. Such injury will not go unnoticed by Kadarbhai. However, he has chosen not to speak anything about this injury to the appellant. Since the injury was caused to the appellant in the same transaction it was expected of the prosecution witnesses to tell the truth before the Court

and ought to have explained the injury caused to the appellant. When an attempt is being made by the prosecution to suppress such vital fact from the Court, Court can always draw an inference that the prosecution is not coming out with true facts of this case. It is therefore, possible for us to infer that the prosecution witness Kadarbhai is not telling the whole truth and though within his knowledge, he is trying to plead ignorance with regard to the injury suffered by the appellant. It is also required to be noted here that the prosecution has sent to the FSL the blood stained clothes of the deceased and the injured witness, but no attempt had been made to find out what blood group the appellant belonged to. The report of the Serologist of the FSL shows that on the knife there was human blood which was of "B" group and this could as well be connected with the blood of the deceased because it was of the same group. However, in absence of the details regarding the blood group of the appellant it is difficult to state that this very Muddamal knife bore the stains of blood of the deceased alone. This evidence the prosecution could have procured, but it has chosen not to do so. In the circumstances, we are inclined to uphold the contention of Mr. Lakhani that the prosecution has not narrated the true facts atleast with regard to the origin of the incident.

12. This would bring us to the next question whether appellant deserves acquittal or he can be held guilty of offence u/S. 302 or any lesser offence. Since it is found in this case that the prosecution is not telling the correct facts with regard to the origin of the incident, it is difficult to decide who was the first assailant. In that case, even when the appellant has not specifically pleaded the availability of the right of private defence, the Court can draw such inference and hold that on the basis of the evidence before it, it was possible to infer that such right was available to the appellant. In the circumstances, we are of the opinion that there is possibility that the appellant was assaulted first which made him entitled to have the right of self defence which he tried to exercise by snatching away the knife and causing injuries to the deceased as well as to the complainant. The suggestions have been made by the defence in the cross-examination of Kadarbhai that there was scuffle going on between the appellant on one hand and the complainant and the deceased on the other to take possession of the knife and in the process the injuries were received by the deceased as well as the complainant. May be that the appellant to avoid the complainant and the deceased to take possession of the

knife had caused them some injuries, but considering the fact that both these victims had received injuries of serious nature and the deceased had received inall four injuries and the same number of injuries had been received by the injured witness and further the nature of these injuries also show that after receiving about one or two injuries both the victims might not have been in a position to carry on the scuffle any further. It clearly shows that the appellant though initially had a right of self defence, he had exceeded it by causing more injuries than necessary to defend himself. In that view of the matter, it can clearly be said that he had exceeded the right of private defence and in that event his case will be covered under exception no. 2 to section 300 of the IPC and it would not be offence punishable u/S. 302 of the IPC. It would squarely fall in the ambit of section 304 Part-I of the IPC. Therefore, we hold that the conviction and sentence imposed on the appellant by the learned trial Judge u/S. 302 of the IPC is erroneous and it is required to be converted into one u/S. 304 Part-I of the IPC. So far his conviction and sentence u/S. 307 is concerned, it is required to be maintained. The conviction and sentence u/S. 135 of the BP Act is quashed and set aside. Fine, if paid, for that offence be refunded.

13. So far the question of sentence is concerned, we find from the record that the appellant has already undergone imprisonment of over 9 years and 6 months. In our opinion, the ends of justice would meet if he is sentenced to suffer imprisonment already undergone. In that view of the matter, the sentence of life imprisonment imposed upon him is set aside and instead the sentence of imprisonment already undergone is imposed. The sentence of fine imposed by the trial Court is retained.

14. In the result, the appeal is partly allowed. The appellant is directed to be set at liberty forthwith unless required for any other purpose. Muddamal to be disposed of in accordance with the direction of the Ld. trial Judge.

[M.H. KADRI, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.